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FILED

NOV 19 2019

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA  
UPPER MISSOURI DIVISION  
GALLATIN RIVER BASIN (41H)

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CLAIMANTS: Jesse Guenther; Tracey Guenther; Kent Kauffman;  
Kenneth C. & Emrie A. Miller Trust; James Dolan, Jr.;  
Samantha Dolan; Amelia Smith; Gregory Smith;  
Andrea S. Ceartin; Jake Ceartin; Joni M. Westfall;  
Michael Westfall

**CASE 41H-S5**  
**41H 113305-00**

**Split Claim:**  
**41H 30122600**

OBJECTORS: Jesse Guenther; Tracey Guenther

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

**PROCEDURAL BACKGROUND**

This case has a lengthy procedural history. To summarize, on September 30, 2015, James Dolan and Samantha Dolan (collectively, the “Dolans”) filed forms to split the ownership of water right claim 41H 113305-00, which they own with several other parties. The Water Court consolidated the split request into this case.

On May 4, 2017, the water master assigned to this case issued a Master’s Report recommending the granting of a motion filed by Melissa Batters to amend the flow rate of claim 41H 113305-00 to 2.50 cfs.<sup>1</sup> On May 23, 2017, the Court issued an Order Adopting Master’s Report in this case. The Master’s Report and the Order Adopting

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<sup>1</sup> The Order states that the owners of claim 41H 113305-00 are parties to a private subordination agreement with third parties that objected to the Batters motion to amend. Nothing in this Order is intended to address the terms of that stipulation.

Master's Report did not allocate the water right between the various co-owners of claim 41H 113305-00 and did not rule on the split request.

Following the May 2017 Order Adopting Master's Report, the case was recommitted to a water master to address the Dolans' split request. Jesse and Tracy Guenther (collectively, the "Guenthers"), who co-own an interest in claim 41H 113305-00, objected to the split. The Guenthers contend that the Dolans abandoned their interest in claim 41H 113305-00.

This case was reassigned to the Associate Water Judge on May 2, 2019. Following reassignment, the Court issued an Order on Pending Motions on June 7, 2019. As part of the Order, the Court granted the Dolans' split request, but did not quantify the split and reserved ruling on the elements of the split claim until after a hearing on the Guenthers' objection. As requested by the Court, the Dolans made a subsequent submittal on June 16, 2019 clarifying the elements of their split request.

The objection period for the Basin 41H Preliminary Decree opened and closed while this case was in progress. The Dolans and the Guenthers each submitted objections to claim 41H 113305-00 during the objection period.

This matter came before the Court on August 27, 2019 for an evidentiary hearing at the Montana Water Court in Bozeman. Prior to the hearing, the parties executed a prehearing order and stipulated to certain facts. The hearing was limited to the abandonment issue raised by the Guenthers' objection to the split request. Tracy Guenther, James Dolan and Melissa Batters testified at the hearing. The testimony of Jake Ceartin was offered by deposition transcript without objection. Each party also introduced various exhibits. Following the hearing, each party submitted proposed findings of fact and conclusions of law.

After assessing the credibility of the witnesses, evaluating all of the evidence, and considering the arguments of the parties and their filings, the Court makes the following findings of fact and conclusions of law:

## FINDINGS OF FACT

1. In about 1968, Hale Hubbard ("Hubbard") purchased property on Cobb Hill Road in Gallatin County. (Hr'g Tr. 12:35.<sup>2</sup>)

2. On November 17, 1981, Hubbard filed a Statement of Claim for an existing water right, together with various supporting documents. (Ex. D-1.) The water right claim was assigned claim number 41H 113305-00.

3. Claim 41H 113305-00 claims the right to divert water from South Dry Creek with a priority date of May 25, 1909, and a flow rate of 2.5 cfs, to irrigate a 14-acre place of use in the E2NESE of Section 13, Township 2 South, Range 4 East, Gallatin County, Montana. (Ex. D-1, D-2.) Hubbard owned all of the place of use at the time he filed the statement of claim. Hubbard also owned additional property outside the 14-acre place of use.

4. Water diverted from South Dry Creek under claim 41H 113305-00 has been delivered to the Hubbard property through the Myron Ferris Ditch and a lateral ditch leading to Hubbard's property. On the property, the lateral ditch splits into two lateral ditches that deliver water to different areas of Hubbard's property. (Ex. D-1:5.)

5. While Hubbard owned the property, he raised horses and grew hay for feed on the property. Hubbard operated an extensive irrigation system that included a pump house, piping, and a combination of sprinkler and flood irrigation. Hubbard used both the east and west lateral ditches.

6. Hubbard owned the entire 14-acre place of use until sometime between 1987 and 1989 when a portion of Hubbard's property was conveyed to Barrows North Central Furniture Company, Inc. ("Barrows").<sup>3</sup> (Hr'g Tr. 12:55; Ex. D-1:12-16.) As part

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<sup>2</sup> The hearing transcript time reference refers to the time of day as recorded during the August 27, 2019 hearing.

<sup>3</sup> Copies of the deeds conveying property from Hubbard to Barrows, from Barrows to Brewster, and from Hubbard to the Batters are not included in the evidentiary record, but are not necessary to the disposition of the issues in this case because, except as specifically stated with respect to reservations of water rights, no conclusions of law are being made as to the chain of title.

of this conveyance, Barrows' attorney submitted a water right transfer certificate to the Department of Natural Resources and Conservation ("DNRC"). (Ex. D-1:17.)

7. In 1990, Barrows conveyed its property to Charles B. Brewster and Susan E. Brewster ("Brewster"). As part of this conveyance, the parties submitted a water right transfer certificate to the DNRC. Barrows did not reserve any portion of the water right appurtenant to the property being conveyed. (Ex. D-1:21.)

8. While Brewster owned the property, they continued to use it to raise horses. They kept the ground irrigated and grew hay, similar to what was done when Hubbard owned all the property.

9. In 1998, Hubbard conveyed to Ron J. Batters and Melissa L. Batters property he owned that had not previously been conveyed to Barrows. Melissa L. Batters is Hubbard's daughter, and was raised on the property. She lived in Wyoming for a period of time and returned to the property in about 1992. As part of this conveyance, the parties submitted a water right transfer certificate to the DNRC. Hubbard did not reserve any portion of the water right appurtenant to the property being conveyed. (Ex. D-1:21.)

10. While Melissa Batters owned her portion of the original Hubbard property, she continued to irrigate it out of the east ditch.

11. In January 2004, Brewster conveyed real property to Richard and Carisa Fillbach ("Fillbach") and Michael and Tamara Carish ("Carish"). (Ex. D-7:1.) As part of the Brewster to Fillbach and Carish conveyance, the parties submitted a water right transfer certificate to the DNRC. Brewster did not reserve any portion of the water right appurtenant to the property conveyed to Fillbach and Carish. Fillbach and Carish continued to irrigate the property while they owned it.

12. In February 2006, Fillbach and Carish conveyed to Cobb Hill, LLC ("Cobb Hill") the property they obtained from Brewster. As part of this conveyance, the parties submitted a water right transfer certificate to the DNRC. Fillbach and Carish did not reserve any portion of the water right appurtenant to the property being conveyed. The DNRC received, but did not process the ownership update to update ownership information for several years.

13. In 2006, Cobb Hill subdivided their property creating “Cobb Hill Minor Subdivision No. 390” (the “Subdivision”). The Subdivision is a five-lot residential subdivision located in the NESE of Section 13, Township 2 South, Range 4 East, P.M.M., Gallatin County, Montana. (Agreed Facts, ¶ 1.) The Subdivision is located within the place of use of water right no. 41H 113305-00. (Agreed Facts, ¶ 2.)

14. On March 21, 2006, a planner for Gallatin County prepared a staff report on the Subdivision application. The report recognized the existence of an irrigation water right, but does not find that the water right was not actively being used or had been abandoned. The staff report recommended that the subdivider abandon ditches, but did not recommend that water rights be abandoned. The report recommended that the subdivider provide a statement regarding the future disposition of water rights. (Ex. G-9.)

15. Rich Fillbach, the representative of the subdivider told the county planner, that Cobb Hill planned to retain ownership of the water rights associated with this property after the Subdivision was approved. (Ex. G-11 at 2.)

16. The county planner prepared a subsequent staff report on October 10, 2006. This report concluded that the subdivider satisfied the water right disposition recommendation by noting that future use of the water would be approved by DNRC. The October 10, 2006 report did not require that water rights within the Subdivision be abandoned, nor did the report recommend abandonment as a condition of subdivision approval. (Ex. G-10 at 7.)

17. In conjunction with the creation of the Subdivision, Cobb Hill, as Declarant recorded as doc. no. 2244984, records of Gallatin County, Montana a “Declaration of Covenants for Cobb Hill Minor Subdivision (the “Covenants”). (Ex. G-2.) The Covenants recognize that properties burdened by the Covenants may have water rights and state:

Lot owners may not remove water or cause water to be removed from irrigation ditches or other surface water sources, without deeded water rights. Before any maintenance and/or improvements are performed on the ditches the owner of the water right must give written permission for work proposed.

(Ex. G-2 at 11, § 7.1(f).) The Covenants were amended and restated in 2008, but this provision did not change. (Ex. G-2 at 27.)

18. As part of the Subdivision approval process, the Montana Department of Environmental Quality (“MDEQ”) issued a Certificate of Subdivision Approval that bears the identification number E.Q. #06-2476 (the “MDEQ Approval”). The MDEQ Approval states that “small ‘feeder’ ditches across the lots will be abandoned (doesn’t include the irrigation ditch along the east boundary).” (Ex. G-8.) The MDEQ Approval did not require that water rights be abandoned.

19. In July 2009, following approval of the Subdivision, Cobb Hill sold Lots 1, 2, 3, and 4 of the Subdivision to the Van D. Ewing Revocable Trust and the Jody F. Ewing Revocable Trust (the “Ewing Trust”). Ex. D-7:6-7.) As part of this conveyance, the parties submitted a water right transfer certificate to the DNRC. Cobb Hill did not reserve any portion of the water rights appurtenant to the property it conveyed to Ewing Trust.

20. Jake Ceartin is Van Ewing’s step-son. After Ewing Trust acquired Lots 1, 2, 3 and 4 of the Subdivision, Jake Ceartin maintained the property. As part of the maintenance, Jake Ceartin coordinated the division of water to the property with Melissa Batters and continued to irrigate the Ewing Trust property. A control structure splits the water between the east ditch, which Ms. Batters was using, and the west ditch, which Mr. Ceartin used to deliver water to the Ewing Trust lots.

21. In December 2009, Ewing Trust conveyed Lot 2 to Andrea S. Ceartin and Jake Ceartin. (Ex. D-8:8.) The deed conveying Lot 2 did not reserve any water rights.

22. In 2014, the DNRC notified Ewing Trust that the ownership records for Lots 1, 2, 3 and 4 needed to be updated. At that time, the DNRC had misplaced the ownership update form related to the 2006 conveyance from Fillbach and Carish to Cobb Hill. Ewing Trust responded by submitting the forms necessary to update the ownership to Ewing Trust as to Lots 1, 3 and 4, and to the Ceartins as to Lot 2. (Ex. D-1:64-88; 129-133; 138-140.)

23. On September 30, 2015, Andrea S. Ceartin and Jake Ceartin conveyed Lot 2 to the Dolans (Ex. D-8:10-11.) The deed conveying Lot 2 did not reserve any water rights.

24. Jake Ceartin lived on Lot 2 from 2009 to 2015 while he and his wife owned it. (Ex. D-14, 13:23-14:4.) During the time the Ceartins owned Lot 2, they used the east ditch and the lateral ditch to irrigate trees on their property. (Ex. D-14, 38:21-39:1.)

25. On August 19, 2016, Ewing Trust conveyed Lot 3 to the Dolans. The deed conveying Lot 3 did not reserve any water rights. (Ex. D-9:8-9.)

26. The Dolans continue to own Lot 2 and Lot 3 of the Subdivision. (Agreed Facts, ¶ 4.) Since the time that the Dolans acquired Lots 2 and 3, they have used water conveyed to their property through the Myron Ferris Ditch and lateral ditches to irrigate trees and grasses on the property during the irrigation season. The Dolans have two pumps that they use to run a sprinkler system on Lot 2 from the west ditch, and they flood-irrigate portions of Lot 2 with water from the east ditch. (Hr'g 1:30-1:31.)

27. In 2019, the MDEQ sent correspondence to the Dolans regarding compliance issues relating to a condition of the Subdivision Approval. MDEQ's correspondence relates to issues associated with the use of the irrigation ditch and does not determine the ditch is abandoned, nor does it indicate that there has been an intent on the part of any current or past owner of Lot 2 or Lot 3 to abandon water right claim 41H 113305-00. (Ex. G-18.)

28. In their July 16, 2019 Clarification on Split Claim, the Dolans specified that they request that a separate water right be carved out of claim 41H 113305-00 with the following elements:

Acres:	4.38
Flow Rate:	359.02 gpm
Volume:	15.68 acre feet
Priority Date:	May 25, 1909
Place of Use:	E2NESE, Sec. 13, Twp. 2S, Rge. 4E

## PRINCIPLES OF LAW

1. A properly filed statement of claim for an existing water right is prima facie proof of its content. Section 85-2-227, MCA. Prima facie proof may be contradicted and overcome by a preponderance of the evidence. *Id.*; Rule 19, W.R.Adj.R.

2. Water rights transfer with the conveyance of real property unless specifically reserved in an instrument of conveyance. Section 85-2-403(1), MCA; *Adams v. Chilcott*, 182 Mont. 511, 518, 597 P.2d 1140, 1145 (1979); *MacLay v. Missoula Irrigation Dist.*, 90 Mont. 344, 3 P.2d 286 (1931)

3. The Water Court has sole jurisdiction to determine whether an existing water right is abandoned. Section 85-2-227(3). The Water Court does not have jurisdiction to determine the validity of ditch rights. *Mildenberger v. Galbraith*, 249 Mont. 161, 166, 815 P.2d 130, 134 (1991) (“determination of whether or not a ditch right exists is entirely bifurcated from the water right issue”).

4. A finding of abandonment requires both nonuse and intent to abandon. *Klamert v. Iverson*, 2019 MT 110, ¶ 14, 395 Mont. 420, 443 P.3d 379. The party asserting abandonment bears the initial burden of proving a long period of continuous nonuse. *Heavirland v. State*, 2013 MT 313, ¶ 19, 372 Mont. 300, 311 P.3d 813. Proof of continuous nonuse for a sufficient period raises a rebuttable presumption of an intent to abandon. *Heavirland*, ¶ 23. The length of the continuous period of nonuse sufficient to shift the burden is a question of fact. *Klamert*, ¶ 15. If a continuous period of nonuse is shown, the burden of proof shifts to the claimant or nonuser to explain the reasons for the nonuse. *Klamert*, ¶ 15.

5. Other than presumptions declared conclusive by statute, all presumptions are disputable and may be controverted. Rule 301(b)(1) & (2), Mont. R. Evid.

## ANALYSIS

The Guenthers’ abandonment argument has two parts. First, they contend that there has been such a long period of nonuse of water on the property that the Dolans now own as to raise a presumption of abandonment which the Dolans have failed to rebut. Second, and somewhat interrelated, they maintain that the Gallatin County and MDEQ



documents approving the Subdivision caused the water right to be abandoned, at least as to the Dolans' property.

The Guenthers have not proved a sufficiently long period of nonuse to shift the burden to the Dolans to rebut a presumption of abandonment. Hale Hubbard irrigated the property consistently while he owned it. Each of the subsequent owners have conducted at least some irrigation on what is now the Dolans' property. While there may have been short periods without irrigation, the Guenthers have not proved any significant gaps where water has not been diverted and put to beneficial use on what now is the Dolans' property.

Even if there had been a gap in irrigation sufficient to shift the burden to the Dolans, the evidence meets the test to show lack of intent to abandon the water right appurtenant to the Dolans' property. None of the deeds in the chain of title for Lots 2 and 3 indicate any reservation of water rights by a grantor. In each of the transactions, the applicable ownership update forms either were submitted or were later updated, indicating that grantors and grantees intended that the water rights remain active and be transferred.

The Guenthers' argument that the documents related to the Subdivision conclusively caused abandonment also falls short. The Guenthers cite no subdivision statute or rule that requires water rights to be abandoned as a condition of subdivision approval. The documents produced by the Guenthers in this case also do not condition subdivision approval on abandonment of water rights. The Covenants allow water use by owners of deeded water rights. Because the Guenthers did not prove that any water rights ever were reserved, Hubbard's interest in claim 41H 113305-00 passed to his successors-in-interest, including the Dolans. The Dolans therefore have deeded water rights within the meaning of the Covenants.

At most, the MDEQ Approval suggests that the owners of the lots within the subdivision were required to abandon "small feeder ditches." It is far from clear whether the "small feeder ditches" include the west or east laterals that have delivered water to Lots 2 and 3. Even if they do, abandonment of a ditch right does not cause a water right

to be abandoned, nor does this Court have jurisdiction to make that conclusion. Even read broadly, nothing in the MDEQ Approval purports to terminate water rights or conclusively establish that any water rights were abandoned as a condition of subdivision approval.

### **CONCLUSIONS OF LAW**

1. The Dolans acquired an undivided interest in water right claim no. 41H 113305-00 when they acquired Lot 2 in 2015, and an additional undivided interest in water right claim no. 41H 113305-00 when they acquired Lot 3 in 2016.

2. The Guenthers and all other parties on the service list received notice of this proceeding and either participated or waived their right to participate.

3. The Guenthers did not prove a long enough period of nonuse by the Dolans and their predecessors to shift the burden of proof to the Dolans to rebut a presumption that water right claim 41H 113305-00 is abandoned.

4. Even if the burden of proof had shifted to the Dolans, they provided sufficient proof of lack of intent to abandon to rebut any presumption of abandonment.

5. The Guenthers failed to prove that water right claim 41H 113305-00 is abandoned as a matter of law.

### **ORDER**

Based upon the foregoing, it is hereby ORDERED:

1. Child claim 41H 30122600 is generated with the following elements:

Acres:	4.38
Flow Rate:	359.02 gpm
Volume:	15.68 acre feet
Priority Date:	May 25, 1909
Place of Use:	E2NESE, Sec. 13, Twp. 2S, Rge. 4E

2. The elements of parent claim 41H 113305-00 are modified as follows:


Acres:	9.62
Flow Rate:	1.70 cfs
Volume:	33.32 acre feet

Priority Date: No change

Place of Use: No change

3. The Guenthers objection that all or part of claim 41H 113305-00 is abandoned is DENIED with prejudice. Neither the Guenthers nor any other party who received notice of this proceeding may relitigate issues resolved in this case as part of the resolution of Preliminary Decree objections to claim 41H 113305-00 or claim 41H 30122600.

DATED this 19<sup>th</sup> day of November, 2019.

  
Stephen R. Brown  
Associate Water Judge

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**Caption updated 11/13/19**